Filed 3/8/19 P. v. Vega CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ALFREDO VEGA,

Defendant and Appellant.

F074752

(Super. Ct. No. F16903395)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Julia J. Spikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael p. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary and Lewis A Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant was convicted of corporal injury on a spouse, negligent discharge of a firearm, and possession of an assault weapon. His sentence was enhanced pursuant to

Penal Code[1] section 12022.5, subdivision (a), for personal use of a firearm. On appeal, he contends the court erred by not staying his sentence for negligent discharge of a firearm pursuant to section 654 because both of his crimes were part of an indivisible course of action. He also contends there are errors in the abstract of judgment and his case should be remanded for resentencing pursuant to Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill No. 620). We disagree with his contention that his sentence for negligent discharge of a firearm should be stayed but agree there are errors in his abstract of judgment that must be corrected, and the matter should be remanded for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On May 28, 2016, at approximately 7:30 p.m., appellant and his wife left a restaurant bar. In the vehicle, they began arguing about infidelity, and appellant's wife told him she did not love him anymore. Appellant was shocked and struck his wife at least twice in the mouth. A witness observed appellant and his wife arguing in the car at approximately 9:00 p.m. and called the police because she opined the woman sounded fearful as if she had been kidnapped. The witness provided the license plate of the vehicle to the police. When appellant and his wife arrived at their home, she got out of the vehicle, and he chased after her. He chased her up the stairs. She told him she was leaving and was opening a drawer in the master bedroom when he got there. He threw her away from the drawer and hit her several more times. She fell on the bed, and he went to use the restroom. Appellant testified that after he came out of the restroom, his wife was aiming a gun at him. He reached for the gun, grabbed her hand, and as he grabbed her hand, the first shot went off. He started wrestling with her. He threw her on the bed and a second shot went off behind them. He took the gun away from her.

The police received a dispatch call at approximately 9:15 p.m. and responded to appellant's home. One of the responding officers rang the doorbell. Appellant answered,

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[1] All further undesignated statutory references are to the Penal Code.

stated, "[s]he's ok," and closed the door. The officer continued to knock and ring the doorbell several times. The door reopened, and appellant's wife came out with a bloodied face and swollen eyes. She was bleeding from the nose and lips and crying. Appellant walked out behind her and stated, "I know what I did." The victim told another officer at the scene appellant had hit her in the front passenger seat in their vehicle and eventually brought her back to their house where he continued hitting her. She told the officer appellant pointed a gun at her and put the gun in her mouth. The victim was taken to the hospital for treatment of her injuries. At the hospital, she told the treating physician her husband struck her in the face and head with an assault rifle. The victim had injuries to her face and teeth and was unable to eat solid foods normally at the time of trial.

The police conducted a search of the residence and observed two bullet strike marks upstairs in the master bedroom of the house and found casings from a handgun being fired as well as a semiautomatic handgun, with a live round stuck in the breech. They also found an SKS assault rifle that did not comply with California law. There was apparent blood on the slide of the handgun and the barrel of the assault rifle. The police conducted a search of the vehicle. There was blood on the front passenger seat, side arm rest and door handle, seat and dash. There was no blood on the driver's seat.

The jury convicted appellant of corporal injury to a spouse (§ 273.5, subd. (a); count 1); criminal threats (§ 422; count 2); negligent discharge of a firearm (§ 246.3, subd. (a); count 3); and possession of an assault weapon (§ 30605, subd. (a); count 5). The jury found true allegations as to count 1 that appellant personally used a firearm pursuant to section 12022.5, subdivision (a), and that he inflicted great bodily injury pursuant to section 12022.7, subdivision (e).

At appellant's sentencing, the court struck count 2 on its own motion due to insufficient evidence. As to count 1, appellant was sentenced to the low term of two years. As to counts 3 and 5, he was sentenced to two concurrent two-year terms. The

court imposed the low term of three years on the personal firearm use enhancement and the low term of three years on the great bodily injury enhancement. He received a total sentence of eight years.

I. Section 654

Appellant argues he was convicted of both corporal injury on a spouse and negligent discharge of a firearm in violation of section 654's prohibition against multiple punishment. Appellant claims his sentence for negligent discharge of a firearm should have been stayed pursuant to section 654 because his actions constituted a single course of conduct with one intent of inflicting violence on his wife. We disagree.

Section 654, subdivision (a) reads in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[T]he section's proscription extends to include both concurrent and consecutive sentences …." (*In re Adams* (1975) 14 Cal.3d 629, 636.)

" ' "Section 654 has been applied not only where there was but one 'act' in the ordinary sense … but also where a course of conduct violated more than one statute … within the meaning of section 654." [Citation.] [¶] Whether a *course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) But even if a course of conduct is "directed to one objective," it may "give rise to multiple violations and punishment" if it is "divisible in time." (*Id.* at p. 639, fn. 11.) Where the defendants' acts are "temporally separated" they "afford the defendant opportunity to reflect and to renew his or her intent before committing the next [offense], thereby aggravating the

violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Appellant contends he had one intent of inflicting violence on his wife. By imposing separate sentences on all counts, the trial court implicitly found the offenses were committed pursuant to separate intents and objectives or, alternatively, that there was one intent and objective, but the offenses were reasonably separated by time.

"A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.) We review for " 'sufficient evidence in a light most favorable to the judgment and presume in support of the [trial] court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.' " (*People v. Andra* (2007) 156 Cal.App.4th 638, 640–641.)

People v. Trotter (1992) 7 Cal.App.4th 363 (*Trotter*) is instructive. In *Trotter*, the defendant, while in a vehicle being pursued by a police car, fired three gunshots at the pursuing officer. (*Id*. at p. 366.) The defendant was punished separately for two assaults for two of the three gunshots fired at the pursuing officer. (*Id*. at p. 365.) On appeal, the appellate court rejected the defendant's claim of a single objective, "to avoid apprehension." (*Id*. at p. 366.) The *Trotter* court observed that the defendant pointed his gun at the police car following him and fired one shot, then resumed driving for about a minute and turned back and shot again, and then a few seconds later fired a third shot. (*Id.* at p. 368.) The court noted that each shot required a separate trigger pull, and each shot was separated by periods during which the defendant had time to reflect and consider his next action. (*Ibid.*) The court observed: "Defendant's conduct became more egregious with *each successive* shot. Each shot posed a separate and distinct risk to [the officer] and nearby freeway drivers. To find section 654 applicable to these facts would violate the very purpose for the statute's existence" (*ibid*., italics added), which is " 'to insure that a defendant's punishment will be commensurate with his culpability' "

(*id*. at p. 367). The appellate court concluded it was proper to punish the defendant separately for the first two shots, even though they were fired "within one minute" of one another. (*Id.* at p. 366.)

Here, the acts are separated by not only time, but space. Though the evidence shows appellant continued hitting his wife when they arrived home, it also supports the inference he had time to renew his intent before hitting her and discharging the firearm upstairs. Appellant had to stop the vehicle, turn it off, go inside the house and up the stairs. According to appellant's own testimony, he had stopped hitting his wife to use the restroom before the discharge of the firearm took place. *Trotter* demonstrates renewed intent can take as little as turning around for less than a minute. Further, not only did the discharge of the weapon put appellant's wife, as well as their neighbors, at a "separate and distinct risk" than hitting her, it *substantially heightened* the risk. There is a much greater chance of more serious injury when discharging a firearm than using one's hands. Thus, like in *Trotter*, punishment for both crimes is in conjunction with the purpose of section 654: to insure his punishment is commensurate with his culpability. The court did not err by imposing punishment for appellant's negligent discharge of a firearm conviction.

II. Abstract of Judgment Errors

Appellant's remaining contentions relate to errors in the abstract of judgment. If an abstract of judgment is defective in form, "a new and corrected one may be issued to conform to the judgment." (*People v. McPheeley* (1949) 92 Cal.App.2d 589, 592.) Appellate courts routinely grant requests on appeal to correct errors in the abstract of judgment. (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1075.)

A. Count 2 and Corresponding Fees

Appellant points out the abstract of judgment reflects a conviction on count 2, criminal threats (§ 422), and the corresponding two-year term imposed. Because the court struck count 2, appellant contends the sentence on the conviction and corresponding

term must be deleted from the abstract of judgment. Accordingly, appellant also contends the court security fee imposed pursuant to section 1465.8 and the criminal conviction assessment imposed pursuant to Government Code section 70373 must be reduced by $40 and $30, respectively, to reflect appellant's three rather than four convictions. Respondent concedes.

We accept respondent's concessions. The trial court should correct the abstract by deleting appellant's conviction for criminal threats and the corresponding term of two years.[2]

Though the court ordered a total of $70 in fees, it was required by statute to order $70 per conviction, as both parties acknowledge: $40 for the court security fee and $30 for the criminal conviction assessment.[3] Because appellant had three convictions, we agree with the parties that the trial court should correct the abstract of judgment by reducing the court security fee from $160 to $120 and the criminal conviction assessment from $120 to $90.

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[2] The sentence imposed on count 2 is shown as being concurrent to appellant's base term; thus, his total sentence will remain at eight years.

[3] Section 1465.8, subdivision (a)(1) provides: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on *every conviction for a criminal offense*, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." (Italics added.)

Government Code section 70373, subdivision (a)(1) provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on *every conviction for a criminal offense*, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction." (Italics added.)

B. Restitution and Parole Revocation Fines

Appellant also argues the restitution and parole revocation fines should be corrected to reflect the oral pronouncement of judgment. The court ordered a $400 fine for both the restitution fine imposed pursuant to section 1202.4 and the parole revocation fine imposed pursuant to section 1202.45. The abstract of judgment indicates each fine as $1,400. Respondent argues the reporter's transcript is likely wrong either due to "the trial court misspeaking or due to a mistranscription by the court reporter" and thus the fines should remain at $1,400 each. Respondent bases its position on the fact that the probation report recommended the amount of each fine to be $3,300. We decline to join in this assumption.

The general rule is that the oral pronouncements of the court are presumed correct. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) "As the Los Angeles Superior Court Criminal Trial Judge's Bench Book states on page 452: 'Rendition of judgment is an oral pronouncement.' Entering the judgment in the minutes being a clerical function (Pen. Code, § 1207), a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling. The abstract of judgment is not the judgment of conviction. By its very nature, definition and terms (see Pen. Code, § 1213.5) it cannot add to or modify the judgment which it purports to digest or summarize.' (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 14.)" (*Ibid*.)

Respondent argues we should utilize the exception to the general rule that is applied when the clerk's minutes for some reason are more credible than the oral pronouncement of judgment, citing *People v. Thompson* (2009) 180 Cal.App.4th 974. As appellant points out, *Thompson* dealt with a calculation error. Respondent has not convinced us there is anything about the minute order or abstract of judgment that is more credible than the oral pronouncement of the fine that would persuade us to stray from the general rule. The court was within its discretion to award a fine within the limit

proscribed by statute (between $300 and $10,000). (§ 1202.4, subd. (b)(1).) Thus, we will presume the oral pronouncement was correct. "[W]hether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." (*People v. Smith* (1983) 33 Cal.3d 596, 599.)

Because there is a discrepancy between the oral pronouncement of the restitution and parole revocation fines and their indication in the abstract of judgment, we direct the trial court to correct the abstract of judgment by reducing both the restitution and parole revocation fines from $1,400 to $400 as ordered by the court.

III. Senate Bill No. 620

The jury found true a firearm enhancement pursuant to section 12022.5, subdivision (a), tied to count 1. At the time appellant was sentenced, section 12022.5, subdivision (a) mandated a consecutive enhancement of three, four, or 10 years for persons who personally use a firearm in the commission of a felony or attempted felony. (§ 12022.5, subd. (a).) The trial court enhanced appellant's sentence pursuant to section 12022.5, subdivision (a) by imposing the lower term of three years.

After appellant was sentenced, but while this case was pending on appeal, the Legislature enacted Senate Bill No. 620. As of January 1, 2018, section 12022.5, subdivision (c) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1.)

In supplemental briefing, appellant contends his case should be remanded to give the trial court the opportunity to exercise the discretion authorized by the amended subdivision (c) of section 12022.5. Respondent concedes the foregoing amendment applies retroactively to appellant's case and that his case is appropriate for remand.

We accept respondent's concession without further analysis and remand this matter for the limited purpose of allowing the trial court to consider whether to exercise its discretion under section 12022.5, subdivision (c), to either strike or dismiss the enhancement authorized by section 12022.5, subdivision (a).

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to consider whether to exercise its discretion under Penal Code section 12022.5, subdivision (c) (Stats. 2017, ch. 682, § 1), as amended by Senate Bill No. 620 (2017–2018 Reg. Sess.), to either strike or dismiss the firearm enhancement authorized by Penal Code section 12022.5, subdivision (a).

The court is directed to cause to be prepared an amended abstract of judgment as follows: (1) delete appellant's conviction on count 2 (Pen. Code, § 422) and the corresponding concurrent two-year term; (2) reduce the $160 court security fee to $120 and the $120 criminal conviction assessment to $90; and (3) reduce the $1,400 restitution and parole revocation fines to $400 each. A certified copy of the amended abstract of judgment shall be forwarded to the appropriate authorities.

In all other respects, the judgment is affirmed.

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DE SANTOS, J.

WE CONCUR:

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HILL, P.J.

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SMITH, J.